24-406

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 534. 238

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 25, 1885.

The board of equalization is not held until the first Tuesday after the second Monday in June. They usually sit some three weeks, and then levy the tax.

Compiled Statutes, 1887, page 596, Sec. 70.

The state board of equalization meets on the third Monday in July, and then levies the tax.

Compiled Statutes, 1887, page 598, Sec. 74.

So the assessment process and levy is not completed until the third Monday in July.

No one knows what the lien of his taxes is until six months after they become a lien upon his real estate in Nebraska, and if the policies of insurance in Nebraska depended upon an applicant for insurance stating correctly the amount of the tax lien upon his property, there would scarcely be a good policy in Nebraska—none whose applications were dated in April, May, June, July, August, or September.

T. M. MARQUETT,
ISHAM REAVIS,
Attorneys for Plaintiffs in Error.

24-406

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 I.—*Petition.* *Filed August* 11, 1884.

In the Court of Claims.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY *vs.* THE UNITED STATES. } No. 14438.

To the honorable the Chief Justice and Justices of the Court of Claims:

Your petitioner, The Chicago, Milwaukee and Saint Paul Railway Company, claimant in this case, respectfully represents that it is a corporation, duly incorporated under the laws of the State of Wisconsin, having its principal office of business at Milwaukee, in said State; that it owns and operates divers lines of railways in the States of Wisconsin, Illinois, Iowa, and Minnesota and in the Territory of Dakota; and that since the first of July, 1879, it has transported the United States mails over its said lines of railway for the United States, over the routes hereafter specially described, under and in pursuance of contracts with the Post Office Department, which contracts are in the following form, in substance:

"POST OFFICE DEPARTMENT,
"OFFICE OF THE SECOND ASSISTANT POSTMASTER GENERAL,
"WASHINGTON, ——, 1879.

"SIR: The compensation for the transportation of the mails,
2 etc., on your road, route No. ——, between —— and ——, has been fixed from July 1, 1879, to June 30, 1883 (unless otherwise ordered), under acts of March 3, 1873, and July 12, 1876, and June 17, 1878, upon returns showing the amounts and character of the service for thirty days, commencing ——, at the rate of $—— per annum, being $—— per mile for —— miles.

"If the rate of pay on the route as stated is unsatisfactory, so state to this office at once; otherwise the Department will understand that you assent to this adjustment.

"Very respectfully, etc., —— ——."

Signed by the Second Assistant Postmaster General and directed to the manager of the claimant.

Copies of the said several contracts are ready to be produced by the claimant and will be presented to this honorable Court in the record of this case.

And your petitioner further shows that in pursuance of said contracts your petitioner transported the mail over the following routes, viz:

Route No. 23035, from Chicago to Milwaukee.
" 23054, " Chicago to Byron and Lanark J'ct.
" 25001, " Milwaukee to North McGregor.
" 25002, " Milwaukee to La Crosse.
" 25003, " Milwaukee to Berlin.

Route No. 25004, from Milton J'ct. to Monroe & Thullsburg.
" 25005, " Watertown to Madison.
" 25006, " Horicon to Portage.
" 25007, " Nepenskin to Winneconne.
" 25008, " Oshkosh to Ripon.
" 25020, " Warren to Mineral Point.
" 25021, " Calamine to Platteville.
" 25022, " New Lisbon to Necedah.
" 25023, " Madison to Portage.
" 25024, " Racine to Rock Island.
" 25029, " Lone Rock to Richland Centre.
" 25031, " Tomah to Jenny.

3 Route No. 25034, from Sparta to Viroqua.
" 25035, " Fond du Lac to Iron Ridge J'ct.
Route No. 25039, from Mazomanie to Pra. du Sac.
" 25041, " Elkhorn to Eagle.
" 25047, " Wabasha to Eau Claire.
" 26009, " Mendota to McGregor.
" 26010, " Hastings to Ortonville & Milbank.
" 26012, " Austin to Mason City.
" 26022, " Wabasha to Zumbrota.
" 26023, " La Crosse to Flandreau.
" 26024, " Wells to Mankato.
" 26032, " Reno to Preston.
" 26037, " Minneapolis to Benton.
" 26045, " Hastings to Stillwater.
" 27012, " Clinton to La Crosse.
" 27018, " Davenport to Dewitt & Maquoketa.
" 27020, " Farley to Cedar Rapids.
" 27023, " Beulah to Elkader.
" 27025, " Calmar to Pattersonville.
" 27026, " Conover to Decorah.
" 27027, " Davenport to Calmar.
" 27028, " Savanna to Marion.
" 27034, " Sioux City to Sioux Falls.
" 27039, " Turkey River to Wadena.
" 27040, " Waukon Junction to Waukon.
" 27049, " Canton to Marion & Pattersonville.
" 27053, " Bellevue to Cascade.
" 27072, " Marion to U. P. Transfer.
" 35001, " Sioux City to Yankton.
" 35002, " Marion J'ct. to Mitchell & Chamberlain.
" 35007, " Flandreau to Sioux Falls.
" 35008, " Egan to Howard.
" 35009, " Milbank to Wilmot.
" 35012, " Ashton to Ellendale.
" ——— " Pattersonville to Running Water.

4 And your petitioner further represents that it carried all the United States mails over the said routes in accordance with the said contracts, and as often as they were delivered to your

petitioner, except when prevented by the elements or other unavoidable disaster.

Your petitioner therefore avers that it performed its contracts with the Post Office Department in full, and was and is justly and legally entitled to all the compensation provided for by the said contracts.

Your petitioner alleges that, owing to snow blockades and floods and other unavoidable causes, all of which it was impossible for your petitioner to provide against, it was prevented at various times running its trains of cars over the said routes, and in consequence thereof the United States mails were delayed and accumulated until such times as your petitioner could run its cars over the routes aforesaid.

But your petitioner did carry all the said mail over the said routes finally, and as frequently as it was possible so to do.

And your petitioner further shows that the Post Office Department deducted from the pay of your petitioner for the transportation of the mails upon the said several routes, at divers times during the existence of said contracts, a large sum of money, the Department claiming that it had the right to impose fines and reductions because of the failure of your petitioner to transport the mails according to the schedule of time arbitrarily fixed by the said Department, notwithstanding such failures were owing to no want of diligence or care of your petitioner, but were wholly owing to the causes aforementioned.

That the said fines and deductions, during the terms embraced by the said contracts upon the said routes, altogether amount to the sum of $31,251.86, which sum your petitioner alleges is unjustly and unlawfully witheld from you petitioner by the said Department.

And your petitioner avers that there is justly due to your
5 petitioner from the United States the said sum of $31,251.86 over and above all just credits and offsets, and that no assignment or transfer of said claim, or any part thereof or interest therein, has ever been made.

Wherefore your petitioner prays that a judgment may be rendered in its favor for the said amount.

J. F. FARNSWORTH,
Attorney for Claimant.

STATE OF WISCONSIN, }
Milwaukee County. } *ss:*

Peter M. Myers, being duly sworn, doth depose and say that he is the secretary of the said Chicago, Milwaukee and St. Paul Railway Company, claimant in this case; that he is acquainted with the contents of the foregoing petition, and that he believes the same to be true.

P. M. MYERS.

Subscribed and sworn to before me this 15th day of July, A. D. 1884.

[SEAL.]

H. H. FIELD,
Notary Public, Milwaukee County, Wisconsin.

The general office of the claimant is at Milwaukee, Wisconsin.
The P. O. address of its attorney is 50 B street, N. E., Washington, D. C.

6 II.—*Traverse. Filed August* 25, 1884.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Attorney General.

7 III.—*Motion of Claimant for Leave to Amend Petition, and Allowance of Same. February* 19, 1885.

And now comes the claimant in the above-entitled cause and moves the court for leave to file an amended petition in said cause.

By J. F. FARNSWORTH,
Att'y for Claimant.

Allowed, reserving all rights to the defendants.
February 19, 1885,

WM. A. RICHARDSON,
Chief Justice.

8 IV.—*Amended Petition. Filed Feb'y* 19, 1885.

To the honorable the Chief Justice, and Justices of the Court of Claims:

Your petitioner, The Chicago, Milwaukee and St. Paul Railway Company, claimant in this case, respectfully represents that it is a corporation, duly incorporated under the laws of the State of Wisconsin, having its principal office of business at Milwaukee, in said State; that it owns and operates divers lines of railways in the States of Wisconsin, Illinois, Iowa, and Minnesota, and in the Territory of Dakota; and that since the first of July, 1879, it has transported the United States mails over its said lines of railway for the United States, over the routes hereafter specially described, under and in pursuance of contracts with the Post Office Department, which contracts are in the following form, in substance:

"POST OFFICE DEPARTMENT,
"OFFICE OF THE SECOND ASSISTANT POSTMASTER GENERAL,
"WASHINGTON, ——, 1879.

"SIR: The compensation for the transportation of the mails, etc., on your road, route No. ——, between —— and ——, has been fixed

from July 1st, 1879, to June 30, 1883 (unless otherwise ordered),
9 under acts of March 3, 1873, and June 12, 1876, and June 17, 1878, upon returns showing the amounts and character of the service for thirty days, commencing ——, at the rate of $——, per annum, being $—— per mile for —— miles.

"If the rate of pay on the route as stated is unsatisfactory, so state to this office at once; otherwise the Department will understand that you assent to this adjustment.

"Very respectfully," &c.

Signed by the Second Assistant Postmaster General and directed to the manager of the claimant.

Copies of the said several contracts are ready to be produced by the claimant, and will be presented to this honorable Court in the record of this case.

And your petitioner further shows that in pursuance of said contracts your petitioner transported the mail over the following routes, viz:

Route No. 23035, from Chicago to Milwaukee.
Route No. 23054, from Chicago to Byron and Lanark Junction.
Route No. 25001, from Milwaukee to North McGregor.
Route No. 25002, from Milwaukee to La Crosse.
Route No. 25003, from Milwaukee to Berlin.
Route No. 25004, from Milton Junction to Monroe and Thullsburg.
Route No. 25005, from Watertown to Madison.
Route No. 25006, from Horicon to Portage.
Route No. 25007, from Nepinskin to Minneconne.
Route No. 25008, from Oshkosh to Ripon.
Route No. 25020, from Warren to Mineral Point.
Route No. 25021, from Calamine to Platteville.
Route No. 25022, from New Lisbon to Necedah.
Route No. 25023, from Madison to Portage.
Route No. 25024, from Racine to Rock Island.
Route No. 25029, from Lone Rock to Richland Center.
Route No. 25031, from Tomah to Jenny.
10 Route No. 25034, from Sparta to Viroqua.
Route No. 25035, from Fond du Lac to Iron Ridge Junction.
Route No. 25039, from Mazomanie to Pra. du Sac.
Route No. 25041, from Elkhorn to Eagle.
Route No. 25047, from Wabasha to Eau Claire.
Route No. 26009, from Mendota to McGregor.
Route No. 26010, from Hastings to Ortonville and Milbank.
Route No. 26012, from Austin to Mason City.
Route No. 26022, from Wabasha to Zumbrota.
Route No. 26023, from La Cross to Flandreau.
Route No. 26024, from Wells to Mankato.
Route No. 26032, from Reno to Preston.
Route No. 26037, from Minneapolis to Benton.
Route No. 26045, from Hastings to Stillwater.
Route No. 27012, from Clinton to La Crosse.

Route No. 27018, from Davenport to De Witt and Maquoketa.
Route No. 27020, from Farley to Cedar Rapids.
Route No. 27023, from Beulah to El Kader.
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Route No. 27049, from Canton to Marion and Pattersonville.
Route No. 27,053 from Bellevue to Cascade.
Route No. 27072, from Marion lo U. P. Transfer.
Route No. 35001, from Sioux City to Yankton.
Route No. 35002, from Marion Junction to Mitchell and Chamberlain.
Route No. 35007, from Flandreau to Sioux Falls.
Route No. 35008, from Egan to Howard.
11 Route No. 35009, from Milbank to Wilmot.
Route No. 35012, from Ashton to Ellendale.
Route No. ——, from Pattersonville to Runningwater.

And your petitioner further represents that it carried all the United States mails over the said routes, in accordance with the said contracts, and as often as they were delivered to your petitioner, except when prevented by the elements or other unavoidable disaster.

Your petitioner therefore avers that it performed its contracts with the Post Office Department in full, and was and is justly and legally entitled to all the compensation provided for by the said contracts.

Your petitioner alleges that, between the autumn of the year 1880 and the spring of the year 1883, owing to snow blockades and floods, and other unavoidable causes, all of which it was impossible for your petitioner to provide against, it was prevented at various times running its trains of cars over the said routes, and in consequence thereof the United States mails were delayed and accumulated until such times as your petitioner could run its cars over the routes aforesaid.

But your petitioner did carry all the said mail over the said routes finally, and as frequently as it was possible so to do.

And your petitioner further shows that the Post Office Department deducted from the pay of your petitioner for the transportation of the mails upon the several routes, at divers times during the said last-mentioned period, a large sum of money, the Department claiming that it had the right to impose fines and reductions because of the failure of your petitioners to transport the said mails upon the ordinary schedule of time for the departure and arrival of the mail trains, nothwithstanding such failures were owing to no want of diligence or care of your petitioner, but were wholly owing to the causes before mentioned.

12 That the said fines and deductions, during the said last-mentioned period, upon the said routes altogether, amount to the

sum of $31,251.86, which sum your petitioner alleges is unjustly and unlawfully withheld from your petitioner by the said Department.

And your petitioner avers that there is justly due to your petitioner from the United States the said sum of $31,251.86, over and above all just credits and offsets, and that no assignment or transfer of said claim or any part thereof or interest therein has ever been made.

Wherefore your petitioner prays that a judgment may be rendered in its favor for the said amount.

J. F. FARNSWORTH,
Attorney for Claimant.

DISTRICT OF COLUMBIA, *Washington City.* } *ss:*

John F. Farnsworth, being duly sworn, doth depose and say that he is the attorney for the Chicago, Milwaukee and St. Paul railway, claimant in this case; that he is acquainted with the contents of the foregoing amended petition, and that he believes the same to be true.

JOHN F. FARNSWORTH.

Subscribed and sworn to before me this 19th day of February, 1885.

[SEAL.] JOHN RANDOLPH,
Ass't Cl'k C. of C.

13 V.—*Demurrer to Amended Petition. Filed February* 27, 1885.

And the said defendants, by their attorney general, say that the amended petition in this casue does not allege facts sufficient to constitute a cause of action.

THOMAS SIMONS,
Ass't Attorney General.

VI.—*Argument and Submission of Case on Demurrer. April* 27, 1885.

At a Court of Claims held in the city of Washington on the 27th day of April, A. D. 1885.

The demurrer to the amended petition herein was argued by Mr. Blair for the defendants for the demurrer, and by Mr.
14 Farnsworth, opposed, and submitted.

VII.—*Demurrer Sustained. May* 11, 1885.

At a Court of Claims held in the city of Washington on the 11th day of May, A. D. 1885.

The Chief Justice announced the decision of the Court, and it was ordered that the demurrer of the defendants to the petition of the claimant be sustained.

VIII.—*Judgment Dismissing Petition.*

At a Court of Claims held in the city of Washington on the first day of June, A. D. 1885.

The demurrer in this cause having been sustained, and the claimant having declined to amend its petition, ordered, that the petition of the claimant, The Chicago, Milwaukee and Saint Paul Railway Company, be dismissed.

By the court.

15 IX.—*Application of Claimant for and Allowance of Appeal.*

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY *vs.* THE UNITED STATES. } No. 14438.

And now comes the said plaintiff and prays the court for an appeal to the Supreme Court of the United States from the judgment of this court on the demurrer in the above-entitled cause.

J. F. FARNSWORTH,
Attorney for said Plaintiff.

Filed June 1, 1885.

And now, to wit, June 1, 1885, it is ordered that the appeal be allowed as prayed for.

16 In the Court of Claims.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY *vs.* THE UNITED STATES. } No. 14438.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the judgment of the Court on the demurrer dismissing the petition, of the applicaiion of the claimant for the allowance of appeal to the Supreme Court of the United States, and the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 8th day of June, A. D. 1885.

[Seal of the Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: Court of Claims. No. 534. The Chicago, Milwaukee and St. Paul Railway Company, appellant, *vs.* The United States. Filed June 25, 1885.

FILED
MAR 28 1887
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1887.

The Chicago, Milwaukee and St. Paul Railway Company

vs.

United States.

BRIEF FOR APPELLANTS.

J. F. FARNSWORTH,

Attorney.

Rounsavell, Printer,
Washington, D. C.

The demurrer in this cause having been sustained, and the claimant having declined to amend its petition, ordered, that the petition of the claimant, The Chicago, Milwaukee and Saint Paul Railway Company, be dismissed.

By the court.

15 IX.—*Application of Claimant for and Allowance of Appeal.*

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY *vs.* THE UNITED STATES. } No. 1438.

And now comes the said plaintiff and prays the court for an appeal to the Supreme Court of the United States from the judgment of this court on the demurrer in the above-entitled cause.

J. F. FARNSWORTH,
Attorney for said Plaintiff.

Filed June 1, 1885.

And now, to wit, June 1, 1885, it is ordered that the appeal be allowed as prayed for.

16 In the Court of Claims.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY *vs.* THE UNITED STATES. } No. 1438.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the judgment of the Court on the demurrer dismissing the petition, of the applicaiion of the claimant for the allowance of appeal to the Supreme Court of the United States, and the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 8th day of June, A. D. 1885.

[Seal of the Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: Court of Claims. No. 534. The Chicago, Milwaukee and St. Paul Railway Company, appellant, *vs.* The United States. Filed June 25, 1885.

27-406

Supreme Court of the United States.

OCTOBER TERM, 1887.

The Chicago, Milwaukee and St. Paul Railway Company
vs.
United States.

BRIEF FOR APPELLANTS.

J. F. FARNSWORTH,
Attorney.

Beresford, Printer,
Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, *Appellant*,
vs.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This case was heard in the Court of Claims on the petition and demurrer.

That Court *pro forma* sustained the demurrer, and the plaintiff appealed.

The petition alleges that it transported the mails between 1879 and 1883 upon various roads (set forth in the petition), in pursuance of contracts made with the Post Office Department, which contracts were in the following form in substance:

"WASHINGTON, ——, 1879.

"SIR: The compensation for the transportation of the mails, etc., on your road, Route No. ——, between ——— and ———, has been fixed from July 1, 1879, to June 30, 1883, (unless otherwise ordered,) under acts of March 3, 1873, and July 12, 1876, and June 17, 1878, upon returns showing the amounts and character of the service for thirty days, commencing ———, at the rate of $—— per annum, being $—— per mile for —— miles.

"If the rate of pay on the route as stated is unsatisfactory, so state to this office at once; otherwise the Department will understand that you asssent to this adjustment.

"Yours, respectfully, etc."

Signed by the Second Assistant Postmaster General and directed to the manager of the claimant.

The several blanks in said contracts being filled by the numbers and termini of the routes, and the rates of pay fixed upon the several routes, and their lengths.

The petitioner transported the mails upon all the said routes in accordance with the contracts, except when prevented by the elements or other unavoidable disaster. That between the autumn of the year 1880 and the spring of the year 1883, owing to snow blockades, floods, etc., which it was impossible for the petitioner to provide against, it was at various times prevented running its trains of cars over the routes, and consequently mails were delayed and accumulated until the trains could be gotten through; but the petitioner carried all the mail over the said routes finally and as frequently as it was possible so to do.

That the Post Office Department claims that it had the right to impose fines and reductions because of the failure of the petitioner to transport the mails upon the ordinary schedule for the departure and arrival of the mail trains, notwithstanding such failures were owing to no want of diligence of the petitioner, but to the causes before mentioned; that the reductions made by the Department for the causes aforesaid amount to the sum of $31,251.86.

ARGUMENT.

The question in this case is, Had the Post Office Department the right to make the reductions?

It is claimed under Sec. 3962 of the Revised Statutes—

That section was adopted prior to, and codified in, the postal code of 1872; and since its enactment an entirely new method has been adopted for adjusting compensation for railway mail service, by paying according to the *weight* of mails transported.

Before that, railway companies were paid according to the number of trips, speed, etc., which they made.

Sec. 3962 is as follows: "The Postmaster General may make reductions from the pay of contractors for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed, and not exceeding three times the price, if the failure be occasioned by the fault of the contractor or carrier."

If that section of the Statute did apply to railways, it was, so far as they are concerned, repealed by the enactment of the following Statute, passed March 3, 1879:

"SEC. 5. That the Postmaster General shall deduct from the pay of the railroad companies for every failure to deliver a mail within the schedule time not less than one-half the price of the trip, and when the trip is not performed not less than the price of one trip, and not exceeding in either case the price of three trips. *Provided, however*, that if the failure is caused by a connecting road, then only the connecting road shall be fined. And when such failure is caused by unavoidable casualty the Postmaster General, in his discretion, may remit the fine; and he may make deductions and impose fines for other delinquencies."

20 Stat., 358.

In United States *vs.* Tynen, 11 Wall., 88, the Court says:

"There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870. When there are two

acts on the same subject the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even when two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

"A statute imposing a penalty for the commission of an offense is repealed by a subsequent statute imposing a less penalty for the commission of a higher grade of the same offense."

Smith *vs.* State, 1 Stewart (Ala.), 506.

"A subsequent statute, inconsistent with, and repugnant to, the provisions of a prior one, operates as a virtual repeal of the old one."

United States *vs.* Erwin, 5 McLean, 178.

"In case of two statutes relating to the same subject, and not in terms repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern in the case, this will be construed as repealing the original act."

Sacramento *vs.* Bird, 15 Cal., 294.

See also—

Bartlett *vs.* King, 12 Mass., 563.
Commonwealth *vs.* Cooley, 10 Pick., 37.
Morris *vs.* Crooker, 13 Howard, 429.
Davies *vs.* Fairbairn, 3 Howard, 636.
State *vs.* Whitworth, 8 Porter (Ala.), 434.
Sullivan *vs.* People, 15 Ill., 233.
Nichols *vs.* Squire, 5 Pick., 168.
Commonwealth *vs.* Kimball, 21 *id.*, 373.
Sedgwick on Statute Law, 126.
Parsons *vs.* Hardy, 14 Wend., 215.

The section of the Act above quoted, of March 3, 1879, was, on the 11th of June, 1880, expressly repealed.

21st Stat., p. 178.

The repeal of a repealing statute does not revive the original.

Sec. 12, Rev. Stat.

There can be no controversy in this case as to the service having been performed under contracts.

See Railway Co. *vs.* U. S., 101 U. S., 543.

Therefore, as there was no statute authorizing the reductions at the time they were made, (viz: between the Autumn of 1880, and the Spring of 1883, as stated in the Petition,) they were wrongfully made.

J. F. FARNSWORTH,
Attorney for Claimant.

127-406

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE CHICAGO, MILWAUKEE AND Saint Paul Railway Company, appellants,
vs.
THE UNITED STATES, APPELLEE. } No. 238.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE CHICAGO, MILWAUKEE AND Saint Paul Railway Company, appellants,
vs.
THE UNITED STATES, APPELLEE. } No. 238.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This cause was heard upon demurrer to petition of claimants. The demurrer was sustained and the claimants declining to amend, on the 1st day of June, 1885, an order was passed by the Court of Claims dismissing the petition. From this order an appeal was prayed, which was granted.

The petition alleges that claimant transported the mails for the United States, between the years 1879 and 1883, over various routes and under various contracts, therein set out; that the mails were carried according to the terms of said contracts, except when delayed in consequence of unavoidable disaster; that between the autumn of the year 1880, and the spring of 1883, owing to snow blockades, floods, etc., the claimants at times were prevented from running their trains over the routes, in consequence of which the mails were delayed. For this failure the Post-Office Department imposed fines under the provisions of section 3962, Revised Statutes. It is objected that the imposition of those fines was without warrant of law.

There are three statutes to consider in dealing with this question, to wit: Section 3962, Revised Statutes, the act of March 3, 1879, and the act of June 11, 1880. The construction of these various statutes will determine the controversy.

ARGUMENT.

The proposition contended for by appellant's counsel, that when a later act covers the whole subject-matter embraced in a former act, plainly showing that it was a substitute, will operate as a repeal, is not denied. The act of March 3, 1879, did not include all the provisions of section 3962, which section is in these words:

> The Postmaster General may make reductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases, when the trip is not performed,

> and not exceeding three times the price, if the failure be occasioned by the fault of the contractor or carrier.

This section embraced all carriers of the mails and the passage of the act of March 3, 1879, did not effect its repeal, because the entire subject-matter of the section was not included in that act.

Section 5 of the act of March 3, 1879, is as follows:

> That the Postmaster General shall deduct from the pay of the railroad companies for every failure to deliver a mail, within the schedule time, not less than one-half the price of the trip, and when the trip is not performed, not less than the price of one trip, and not exceeding, in either case, the price of three trips. *Provided*, however, that if the failure is caused by a connecting road, then only the connecting road shall be fined. And when such failure is caused by unavoidable casualty, the Postmaster General, in his discretion, may remit the fine, and he may make deductions and impose fines for other delinquencies. (20 Stat. 358.)

It will be seen that the above recited section simply refers to one class of carriers, viz, railroad companies.

All that can be claimed, if a distinction is to be drawn between that and other classes, is that an exception to the general provisions of the former act was created. The effect of the repealing statute of 1880 is then clear. It is not a repealing statute within section 12, Revised Statutes:

> Where the statute creating the exception is repealed, the general statute that was in force all the time would then be applicable to all cases according to its terms. And this would be no violation of the

> rule of construction before referred to, that the repeal of a repealing act should not revive the act repealed. The act of 1858 was equivalent to a proviso attached to the general rule, that it should not be applicable to foreclosure defendants. But if a proviso creating an exception to the general terms of a statute, should be repealed, courts would be afterwards bound to give effect to it according to those general terms, as though the proviso had never existed. And this could not be said to revive a repealed statute. The rule against this relates to cases of absolute repeal, and not to cases where a statute is left in force, and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remains in force, and the exception being taken away, the statute is afterwards to be applied without the exception. (*Smith* v. *Hoyt*, 14 Wis. 256.)

But there is no contrariety in the provisions of the section 3962 of Revised Statutes and the act of 1879. It is possible to reconcile the two acts and construe them in harmony (*McCool* v. *Smith*, 1 Black, 459).

The language of this court in *Ex parte Crow Dog* (109 U. S. R., 570) is peculiarly applicable:

> A meaning can be given to the legislation in question, which the words will bear, which is not unreasonable, which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old (*Wood* v. *The United States*, 16 Pet., 342; *Daviess* v. *Fairbairn*, 3 How., 636; *United States* v. *Tynen*, 11 Wall., 88; *State Stoll*, 17 Wall., 425).

Section 3962 gave the power to the Postmaster-General to make reductions from the pay of contractors, having contracts of any description for carrying the mails, for failures to perform service according to contract, and to impose fines for other delinquencies. It authorized him to deduct the price of the trip in all cases where the trip is not performed, and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

The act of 1879 applied only to railroad companies as carriers of the mails. It provided for substantially the same deductions for the cases *where the trip is not performed*, viz, not less than the price of one trip and not exceeding the price of three trips.

In addition, it directed the Postmaster-General to deduct from the pay of the railroad companies for every failure to deliver a mail *within the schedule time*, and made a different scale for the reductions from that for the failure to at all perform the trip. This statute was both cumulative and affirmative of the code act carried into the Revised Statutes. There is no repugnancy, but perfect harmony (*Wood* v. *The United States*, 16 Pet., 342, 362; *Chew Keong* v. *The United States*, 112 U. S. R., 536, 549).

When this act of 1879 was repealed, in 1880, it left in force all the body of the law, as far as fines and reductions are concerned, except the specific description and amount of a reduction for failures to deliver mails *within the schedule* time. The regulation and powers to punish for this and all other failures are in the Revised Statutes (*United States* v. *Central Pacific R. R. Co.*, 118 U. S. R., 235).